STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2014
v	No. 318372 Wayne Circuit Court
JAMES JACKSON, Defendant-Appellant.	LC No. 13-004908-FH

Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*),[1] possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*), felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. He was sentenced to one to four years' imprisonment for his possession of less than 25 grams of cocaine conviction, one to four years' imprisonment for his possession with intent to deliver marijuana conviction, one to five years' imprisonment for his felon in possession of a firearm conviction, one to five years' imprisonment for his carrying a concealed weapon conviction, and five years' imprisonment for his felony-firearm, second offense, conviction. We affirm, but we remand for the ministerial task of amending the judgment of sentence.

On appeal, defendant contends that defense counsel provided ineffective assistance of counsel by failing to file a witness list before trial, failing to object to prior bad acts testimony, and failing to immediately seek a curative instruction after the bad acts testimony was admitted.

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther*[2] hearing at the trial court level. *People v Heft*, 299 Mich App 69, 80;

[1] We note that the judgment of sentence erroneously cites to MCL 333.7401(2)(a)(*iv*) (possession with intent to deliver). As we address later in this opinion, the proper drug offense for which defendant was convicted is MCL 333.7403(2)(a)(*v*) (possession).

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

829 NW2d 266 (2012). Defendant did not move for a new trial or *Ginther* hearing, so defendant's claim of ineffective assistance of counsel is not preserved on appeal. When a defendant fails to preserve his or her claim of ineffective assistance of counsel, this Court's review is limited to errors apparent from the trial court record. *Id*. In general, a determination of whether a defendant received effective assistance of counsel "'is a mixed question of fact and constitutional law.'" *Id.*, quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "This Court reviews findings of fact for clear error and questions of law de novo." *Heft*, 299 Mich App at 80.

The right to effective assistance of counsel during a criminal trial is guaranteed by the United States and Michigan constitutions. US Const, art VI; Const 1963, art 6, § 1; *Heft*, 299 Mich App at 80. Defendant bears a heavy burden of proving ineffective assistance of counsel because there is a strong presumption that defense counsel provided adequate representation. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). This Court may not substitute its own judgment for that of defense counsel or second-guess defense counsel on matters of trial strategy, as defense counsel has great discretion with respect to the trial tactics that he employs while trying a case. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994); *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

In order to prove that defense counsel failed to provide effective assistance of counsel, defendant must demonstrate that "(1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced defendant." *Heft*, 299 Mich App at 80-81. To establish that defense counsel's representation fell below an objective standard of reasonableness, defendant must show that counsel's conduct was outside the scope of professionally competent assistance under the circumstances. *Vaughn*, 491 Mich at 670. To prove that defense counsel's deficient performance prejudiced defendant, defendant must show that the outcome of the proceeding would have been different but for defense counsel's errors. *Heft*, 299 Mich App at 81.

First, defense counsel did not provide ineffective assistance of counsel by failing to file a witness list. This Court is required to determine "whether counsel's performance was reasonable . . . 'in light of all the circumstances.'" *Vaughn*, 491 Mich at 670, quoting *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). While a defense attorney's failure to file a witness list may constitute performance falling below an objective standard of reasonableness, in the instant case, the record does not support such a view here. It is clear from the record that defense counsel, as a matter of trial strategy, never had planned on calling defendant's mother to testify.[3] See *People v Russell*, 297 Mich App 707, 716; 825 NW2d

[3] During defense counsel's introduction to the jury, he stated that "at this time we'll be, we'll be resting on the prosecutor's case, so we will not be calling any witnesses unless we recall some . . . witnesses." Defense counsel reiterated that there would be no witnesses for the defense when the court was providing the initial instructions to the jury. It was only after the apparent urging of defendant, himself, on the last day of trial did defense counsel seek to allow defendant's mother to testify. The purported purpose of the mother's testimony was to establish

623 (2012) ("Decisions regarding whether to call or question witnesses are presumed to be mattes of trial strategy.") Given that there was nothing to demonstrate that she had any knowledge of the events that led to defendant's arrest, we see no reason to disturb the presumption that planning to not use her as a witness was sound trial strategy.

Regardless, even if defense counsel's failure could be considered as falling below an objective standard of reasonableness, defendant has failed to establish how having his mother testify would have resulted in a different outcome. Here, the only possible effect of defendant's mother's testimony would have been to rebut, with her knowledge of defendant's employment, the inferences drawn from the officers' statements that the cash found on defendant was consistent with the cash found on those who sell drugs. However, even if some other explanation was offered for the money defendant had on his person, this would not lessen the other, more obvious and damaging evidence of the actual, individually packaged drugs on his person. As a result, defendant has not demonstrated that the outcome of the proceeding would have been different had his mother testified.[4]

Second, defendant claims that his counsel was ineffective when he failed to object to testimony provided by Officer Edward Jackson regarding defendant's prior bad acts. While Officer Jackson was on the stand, the trial court accepted questions from the jury. After both the prosecution and defense counsel reviewed the question and had no objection, it was read to the jury.

> *Q.* "Did defendant say anything during or after the arrest?"
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> *A.* He was mentioning something about he got prior arrests. That he had been locked up with guns and dope in the past or something like that, and something about him, it was something about him being locked up in the past for the same thing. It was something similar to that event that—Yes.

Defendant argues that the above constitutes impermissible prior bad act evidence. Pursuant to MRE 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," although such evidence may be admitted for other admissible purposes. Additionally, to be admissible, bad acts evidence must be offered for a proper purpose (i.e., "something other than a character or propensity theory"), the evidence must be relevant, and "the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403." *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

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that defendant had a job, which ostensibly would explain the $470 in small denominations he had on him at the time of his arrest.

[4] It also is important to note that the amount of money found on defendant only implicates any convictions for possessing drugs with the intent to deliver. But there was only one conviction related to delivery, and that was the conviction of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(*iii*). Defendant had, at the time of his arrest, seven individual packaged bags of marijuana (plus, he had thrown another bag away before his arrest). Any explanation for the money he had at the time would have had minimal impact on the jury.

Because neither party sought the evidence, the record is devoid of any "purpose" for the evidence. Furthermore, in viewing the posed question, no one would have foreseen that the answer would implicate any prior bad acts. Regardless, there is no question that the evidence adduced implicates defendant's prior bad acts. And because there was no "purpose" for the evidence, it necessarily follows that there was no "proper purpose" for the evidence. As a result, the evidence was patently inadmissible. Thus, it is a close question whether trial counsel's performance, by failing to object to Officer Jackson's answer, fell below an objective standard of reasonableness. But it is well established that in some circumstances "[d]eclining to raise objections can often be consistent with sound trial strategy," *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008), because an objection can have the effect of attracting unwarranted attention to the objected-to evidence. Thus, defendant has not overcome the strong presumption, *Vaughn*, 491 Mich at 670, that counsel reasonably decided to not object in order to limit the exposure to the jury.

In any event, defendant has not demonstrated the requisite prejudice in order to prevail on this claim. Instead, Officer Jackson's testimony regarding defendant's prior bad acts was brief, the testimony was rarely referenced after it was made, and, more importantly, there was overwhelming evidence to support defendant's convictions. Again, defendant was found with many bags of cocaine and marijuana on his person. The fact that the jury heard that he was in similar trouble before would have had little impact. In fact, in relation to the charge associated with the cocaine, the jury only convicted defendant of the lesser-included count of possession. If the jury had been so motivated to punish defendant for being a "bad person" because of the prior acts evidence, it likely would have convicted him for possession with intent to deliver cocaine instead. Therefore, defendant has not established how the outcome of the proceeding would have been different had defense counsel objected to the prior acts evidence.

And for the same reasons just discussed, defendant cannot prevail on his claim of ineffective counsel based on counsel's failure to request a curative instruction. See also *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003) "[I]t is reasonable to presume that [a] attorney's failure to request [a] cautionary instruction was a matter of trial strategy.").

Though not raised by either party on appeal, this Court notes that the amended judgment of sentence incorrectly states count one of defendant's convictions and provides the incorrect statutory citation. The amended judgment of sentence states that defendant was convicted of possession with intent to deliver less than 25 grams of cocaine, citing MCL 333.7401(2)(a)(*iv*).[5] However, the record is clear that the jury convicted defendant of the lesser offense of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*). During the sentencing hearing, the prosecutor also identified the error and noted that defendant was actually convicted of possession of less than 25 grams of cocaine. We note that this only is a clerical error, as it is evident that the

[5] Even though the amended judgment of sentence stated "25 grams" for this count, MCL 333.7401(2)(a)(*iv*) actually covers circumstances where the defendant possessed with intent to deliver less than 50 grams, not 25 grams. But MCL 333.7403(a)(*v*) does cover mere possession of less than 25 grams.

trial court correctly understood the nature of defendant's actual conviction and noted the sentencing ramifications for this lesser conviction (e.g., 4-year felony instead of 20-year felony and use of grid G instead of grid D for sentencing guidelines calculations, which resulted in a lower sentencing guidelines range).

Therefore, we affirm defendant's convictions and sentences. But we remand for the ministerial task of amending the judgment of sentence to indicate that defendant's cocaine conviction is for possession of less than 25 grams of cocaine in violation of MCL 333.7403(2)(a)(*v*). We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro